Editor's note: appealed -- Civ.No. 91-01-63B (WD VA Sept. 30, 1991), aff'd in part, remanded to OSM (Sept. 30, 1993)

W. D. MARTIN (DBA MARTIN COAL)

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 89-249 Decided August 30, 1991

Appeal from a decision by Administrative Law Judge David Torbett (NX 89-71-R), upholding Notice of Violation No. 88-132-423-008.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre

   The "physically related site" criteria, which were promulgated in 30 CFR 700.11(b)(2) on July 2, 1982 (47 FR 33431), may be applied retroactively to determine whether operations in 1981 are eligible for the 2-acre exemption.

2. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre

   Under 30 CFR 700.11(b), a surface coal mining operation is not exempt from regulation under SMCRA under the "2-acre exemption" where that operation, together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control." The second criterion is met when OSM makes an unrebutted prima facie showing that both operations drain into the same watershed. The third criterion is met when OSM presents evidence indicating that one person engaged in mining at both

operations and that he was in control of both operations. The operator is properly found to be in control of an operation where he flagged it for mining, created a highwall, and exposed and augered coal, notwithstanding that another person also engaged in mining activity on that operation for a portion of the time the operation was underway.

3. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally--Surface Mining Control and Reclamation Act of 1977: Permits: Ownership or Control

Where the facts demonstrate that one person retained control over an operation, he is properly cited for failure to reclaim the site. Even assuming arguendo that he and another person shared control of the operation for a portion of the time the site was being mined, he is still properly cited, as, in such circumstances, both parties are jointly and severally liable for compliance with any applicable performance standards.

APPEARANCES: Elsey A. Harris III, Esq., Norton, Virginia, for appellant; George E. Penn, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

W. D. Martin, d.b.a. Martin Coal (Martin), has appealed from a decision by Administrative Law Judge David Torbett (NX 89-71-R), upholding Notice of Violation (NOV) No. 88-132-423-008, issued to Martin by the Office of Surface Mining Reclamation and Enforcement (OSM) on July 26, 1988 (Exh. R-7). The NOV cited Martin for three violations of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1988), and applicable Departmental regulations.

OSM inspected the site in June 1988 (Exh. R-5). It issued the NOV in July 1988, after issuing a 10-day notice to the Division of Mined Land Reclamation (DMLR), Commonwealth of Virginia, advising DMLR that OSM had reason to believe that Martin was in violation of SMCRA (Exh. R-5), and after DMLR declined to take any enforcement action (Exh. R-6). The NOV cited Martin for failure to reclaim the Call Fat Branch minesite in Dickenson County, Virginia. 1/ Specifically, the NOV cited Martin for

1/ The record contains at least three different appellations for this minesite. Martin's pleadings refer to the site as the "Call Fat Branch" minesite, which is consistent with topographical maps of the area put into

(1) failure to remove all topsoil as a separate operation for blasting, mining, or other surface disturbance; (2) failure to transport, backfill, and grade all spoil materials to eliminate highwalls, spoil piles, and depressions in order to achieve approximate original contour; and (3) placing spoil materials on the downslope and allowing them to remain on the downslope (Exh. R-7).

OSM terminated the NOV as to the first violation (removing topsoil) immediately upon issuance of the NOV (Exh. R-7). The OSM inspector explained at the subsequent hearing that, owing to natural revegetation of the site over the years, there was no remedial action that could be taken (Tr. 33).

Martin filed an application for review of and temporary relief from the NOV. A hearing was held before Administrative Law Judge Torbett on October 25, 1988, in Abingdon, Virginia. Both Martin and OSM appeared at the hearing and presented testimony and exhibits. Judge Torbett granted Martin's request for temporary relief at the hearing (Tr. 116). Following receipt of briefs from the parties, on January 25, 1989, Judge Torbett issued his decision sustaining NOV No. 88-132-423-008, and Martin filed a timely notice of appeal to this Board.

Central to this dispute is the existence of another minesite known as the Trammel Branch minesite, also located in Dickenson County, Virginia, near the Call Fat Branch minesite. These sites were found by Judge Torbett to be "related" under OSM's "relatedness criteria," 30 CFR 700.11(b)(2), for the following reasons: mining operations occurred on both sites within 6 months of each other; the sites were within 5 aerial miles of one another; drainage from both sites went into the McClure River; and both sites were mined by Martin within 12 months of each other (Decision at 5).

If the Call Fat Branch and Trammel Branch minesites were related, it would be proper for OSM to sum the acreages affected at each site in considering whether either site qualifies for an exemption from regulation by OSM under the 2-acre exemption established by section 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1988), and 30 CFR 700.11(b). 2/ The parties stipulated that, even though both the Call Fat Branch and Trammel Branch mine

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fn. 1 (continued)
evidence (Exhs. R-9 and R-10). The transcript consistently refers to the "Colfat" minesite, an apparent misspelling of "Call Fat." District Court
Judge Williams referred to the site as the "Colfax" minesite in his opinion in W. D. Martin v. Hodel, Civ. Action No. 88-0133-B (W.D. Va. Aug. 11, 1988). We shall use Martin's name for the site, the "Call Fat Branch minesite."

2/ We note that, by section 201(c) of the Act of May 7, 1987, 101 Stat. 200, Congress repealed the 2-acre exemption, effective on Nov. 7, 1987. In view of our holding that the 2-acre exemption does not apply, it is unnecessary to consider what effect this repeal might have on the obligation to reclaim the Call Fat Branch minesite if the exemption did apply.

sites affected less than 2 acres, the acreage affected by the two sites, when summed, exceeded 2 acres (Tr. 11). As there was no question that the violations cited by OSM existed, Judge Torbett held that, as the sites were "related," the 2-acre exemption did not apply to the Call Fat Branch minesite, and that OSM properly issued NOV No. 88-132-423-008 to Martin for failure to reclaim it.

Martin questions the applicability of OSM's relatedness criteria and challenges Judge Torbett's finding that he mined both the Trammel Branch and Call Fat Branch minesites within 12 months, alleging that the latter was actually mined by E. C. French d.b.a. French Trucking. He questions whether actual drainage is a necessary element of proof under 30 CFR 700.11(b)(2)(1). He challenges Judge Torbett's decision limiting OSM's burden of proof concerning drainage to a prima facie case. He also argues that an opinion by Judge Glen M. Williams of the United States District Court for the Western District of Virginia (Big Stone Gap Division) in Martin v. Hodel, supra, precludes an assertion by the Department of jurisdiction over the Call Fat Branch minesite.

We first consider the effect of the District Court's Order and Memorandum Opinion in Martin v. Hodel, supra. The record reveals that, in early June 1988, just prior to the inspection that led to issuance of NOV No. 88-132-423-008 for alleged reclamation violations at the Call Fat Branch minesite, OSM issued another NOV (No. 88-132-423-005) to Martin for alleged reclamation violations at the Trammel Branch minesite. 3/ In response to issuance of NOV No. 88-132-423-005, Martin filed a suit in the District Court seeking an injunction against the Department barring his prosecution for any violation of SMCRA regarding his operation of the Trammel Branch minesite. The District Court issued the requested injunction by order entered August 11, 1988 (Martin v. Hodel, Order at 1).

In his order, Judge Williams expressly enjoined the Department for prosecuting any violation of SMCRA regarding the Trammel Branch minesite:

> In accordance with a Memorandum Opinion entered this day, the Court:
>
> (1) Enjoins Donald Hodel, Secretary of the Interior, * * * from prosecuting W.D. Martin, d/b/a/ Martin Coal Co. for any violation of * * * [SMCRA] * * * regarding his operation of the Trammel Branch Mine in June and July of 1981, located in Dickenson County, Virginia. This includes NOV #[88-132-423-005.]

Martin v. Hodel, Order at 1.

3/ In his decision in Martin v. Hodel, supra, Judge Williams refers to NOV No. "88-132-423-006." It is believed that this reference was in error, and that the NOV involved in the dispute before Judge Williams was also NOV No. 88-132-423-005. The latter NOV cites Martin for the violation at the Trammel Branch site that Judge Williams refers to in his decision almost verbatim (Exhs. R-2 and R-4).

The instant case concerns a different minesite, the Call Fat Branch minesite, and a different NOV, No. 88-132-423-008, neither of which is mentioned in the injunctive order. If Martin believed the injunction to bar the Department's enforcement of NOV No. 88-132-423-008 concerning violations at the Call Fat Branch site, we would expect him to have sought enforcement of the injunction rather than pursuing his administrative remedies by participating in the hearing before Administrative Law Judge Torbett. We conclude, as did Judge Torbett, that the Department is not enjoined from prosecuting Martin for this NOV.

Nevertheless, we agree that Judge Williams' order and opinion are controlling insofar as they make findings of fact and conclusions of law that apply to the instant proceeding. Judge Williams held as follows in his memorandum opinion:

> W. D. Martin, the plaintiff, operated a small coal mine in Dickenson County, Virginia, for a period of approximately three weeks in 1981. [4/] At some point, a citizen complained, resulting in an inspection of the mine by the Office of Surface Mining, * * * United States Department of the Interior (OSM). The OSM inspector concluded that the mine had not been restored to its approximate original contour as required by [SMCRA] because there was no sedimentation structure on the site, the highwall had not been covered, and no other reclamation work had been done. The OSM inspector, as required by 30 U.S.C.A. §1271, issued a Notice of Violation (NOV), #81-I-47-33, and a proposed civil penalty of $1,100.00 for (1) failing to pass all surface drainage through a sedimentation pond, 30 C.F.R. 715.17(a), and (2) failing to compact and regrade spoil material in order to eliminate the highwall, 30 C.F.R. 715.14.
>
> Martin filed for a review of the NOV charged by OSM pursuant to 30 U.S.C.A. §1275(a)(1). His defense was that 30 U.S.C.A. § 1278(3) (West Supp. 1988) exempts him from reclamation because the area disturbed by his mining operations was less than two acres (two acre exemption). The Administrative Law Judge (ALJ) agreed, holding that the evidence "clearly showed that W.D. Martin and his coal surface mining operation at the site in question is exempt from the act." Martin v. Office of Surface Mining Reclamation and Enforcement, (CH#2-29-R) at 2 (Office of Hearings and Appeals of the Dept. of Interior, March 11, 1982) (unpublished). The ALJ vacated the NOV for "lack of jurisdiction on the part of OSM to have issued the same." Id. at 3. OSM did not seek review of the decision.
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> Seven years later, OSM again inspected the site and issued another NOV, #[88-132-423-005]. [5/] Through this NOV, OSM cites

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4/ Judge Williams here refers to the Trammel Branch minesite.

5/ Judge Williams referred to NOV No. "88-132-423-006." It appears that the number of the NOV issued by OSM was actually NOV No. 88-132-423-005 (see note 3, supra).

Martin for failure to transport, backfill and grade all spoil material, and to eliminate highwalls, spoil sites and depressions, in order to achieve the approximate original contour at the site Martin mined in 1981.

In response, Martin filed this suit to enjoin the federal defendants from prosecuting the 1988 NOV on the legal ground of res judicata. He argued that, since the ALJ found Martin's Dickenson County mining operation within [SMCRA's] two acre exemption in 1981, OSM is barred from further action for the same site when Martin has engaged in no further mining at the site. Furthermore, it is futile to pursue administrative remedies as OSM ignores unfavorable administrative results. He contends only an injunction from this court shall give Martin the relief he seeks. Of course, OSM disagrees, arguing that Martin must make these legal arguments through the administrative process and this court is without jurisdiction to hear this case.

Martin testified at the hearing on the Preliminary Injunction. He stated that Martin Coal Co. was not incorporated and that he was using the name for fictitious trading purposes. He had retired in 1979 and ceased mining, except for two small mines. The first mine, near [Call Fat Branch], was abandoned in February. [6/] The second, near Trammel branch, was operated for only three weeks in June and July of 1981. The Trammel mine was the subject of the first NOV. He testified that, at the original administrative hearing, he had indeed stated that he had done no other mining since his retirement but that he was wrong since he had forgotten about the first mine he had operated for only a week in February. When asked by the court whether these operations were simultaneous, Martin answered no. He further testified that he had not done any mining since the Trammel operation in the summer of 1981 and that the cost of reclaiming the 1981 site was beyond his means. Martin concluded by stating he was now fully retired from the coal business but that he did some farming.

The Government called Doyle Boothroy as a witness, who is a reclamation specialist with the Office of Surface Mining. He stated that the 1988 NOV is a result of the "two acre task force." This group resulted from a settlement the government made with an environmental group which had sued over the government's enforcement policies for small mines. Although OSM was aware of the 1981 administrative opinion, it nevertheless issued the 1988 NOV because it was not aware of Martin's February operation at [the Call Fat Branch minesite] in 1981. When the affected areas of these two mines are combined, the sum is greater than the two acres. Boothroy testified that OSM

6/ Judge Williams referred to the "Colfax branch" (see note 1, supra).

> relatedness criteria provide that two mines should be combined for purposes of applying the two acre exemption when (1) they are in the same watershed (they do not have to be physically connected); (2) involve the same mining company; and (3) were operated within twelve months of each other. Boothroy confirmed Martin's testimony that there was no evidence of any further mining of the site since 1981. He also stated that no environmental harm had occurred at the Trammel [Branch minesite] as a result of Martin's 1981 operation.

Martin v. Hodel, Memorandum Opinion at 2-4.

Rejecting the Government's exhaustion of administrative remedies argument, Judge Williams ruled that the District Court had jurisdiction to rule on the case and held that res judicata principles prevented relitigation of the Trammel Branch minesite violations:

> [Administrative Law Judge Allen] had jurisdiction of the suit to review the Secretary's decision to issue the NOV [against Martin in 1981 for violations at the Trammel Branch minesite.] 43 C.F.R. §4.1101(a)(3). The proceeding involved the same parties and the same issue: both the government and Martin were litigating a NOV and proposed civil penalty for the [Trammel Branch minesite], just as in the case at bar. The result of the 1981 decision was that Martin's mine fell within the two acre exemption.

Id. at 10-11. Thus, Judge Williams ruled that the 1988 NOV against the Trammel Branch minesite was barred by res judicata. However, he did not hold that the Call Fat Branch minesite also fell within the 2-acre exemption.

Judge Williams also did not reach the merits of OSM's suggestion that the Call Fat Branch and Trammel Branch were related. His consideration of the facts was limited to deciding whether there was any basis for concluding that the dismissal of the NOV against Martin in 1981 was based on fraud or deliberate misrepresentation because, if so, res judicata would not properly apply:

> [OSM] claims Martin deliberately concealed the [Call Fat] Branch mining that occurred a few months prior to the Trammel Branch mining that is the subject of the two NOVs. Martin conceded at the hearing on the preliminary injunction that he mis-stated his mining activities at the 1981 hearing. However, OSM presents no evidence to support deliberate concealment or makes no argument that its investigation of Martin's activities was somehow impeded because of his statement. Having witnessed Martin's testimony and his explanation for the misstatement, the court finds him to be a credible witness, and his testimony

before the ALJ not fraudulent in the absence of any evidence from OSM to the contrary.

Id. at 11. Judge Williams rejected OSM's argument that res judicata did not apply, holding that OSM had failed to establish that Martin deliberately concealed his mining at the Call Fat Branch minesite. See id. at 11-12, citing RESTATEMENT (SECOND) OF JUDGMENTS §70 and Comment (d) (party must demonstrate a substantial case to be proven by clear and convincing evidence that concealment occurred to obtain relief from fraud).

Judge Williams, although he noted Martin's testimony conceding that he had in fact mined the Call Fat Branch minesite in 1981, made no finding as to the extent of Martin's activities there or whether the sites could be properly considered "related."

As Judge Torbett held, unlike for the Trammel Branch minesite, there was no final Departmental determination that the Call Fat Branch minesite was exempt from SMCRA. We find no basis for applying res judicata to bar OSM's prosecution of NOV No. 88-132-423-008 against the Call Fat Branch minesite. We are aware of no injunction barring such prosecution. The questions whether the Call Fat Branch minesite was subject to SMCRA and whether OSM properly issued NOV No. 88-132-423-008 were not decided by the District Court. Therefore, they were properly before Judge Torbett and are properly reviewed by us.

Turning to the merits of the decision under appeal, we find Judge Torbett's conclusion that the Call Fat Branch site was not exempt from enforcement under SMCRA to be supported by the record and in accordance with governing legal principles.

[1] The "physically related site" criteria were promulgated in 30 CFR 700.11(b)(2) on July 2, 1982 (47 FR 33431), after the time that Martin was found to have operated the two minesites in question here. It is established that a retroactive application of these 1982 regulations is permissible to determine whether the mines are eligible for the 2-acre exemption. United States v. Lambert Coal Co., 649 F. Supp. 1470, 1475 (W.D. Va. 1986), aff'd, No. 87-2019 (4th Cir. Nov. 18, 1988).

[2] Under 30 CFR 700.11(b), a surface coal mining operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 CFR 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control." We shall address each of these three criteria seriatim.

There is no dispute that Martin engaged in surface coal mining operations at the Call Fat Branch minesite between December 1980 and February 1981, and at the Trammel Branch minesite in June and July 1981 (Tr. 13-15). Thus, the first criterion is met.

Under 30 CFR 700.11(b)(2)(i), operations are deemed to be "physically related" if drainage from both operations flows into the same watershed at or before a point within 5 aerial miles of either operation. Judge Torbett ruled that there was sufficient evidence presented that drainage from the two operations went into the McClure River. Martin challenges his conclusion concerning proof of drainage.

OSM was required only to present a prima facie case that Martin was covered by SMCRA. This it did by testimony by both OSM's and DMLR's inspectors that the two operations drained into the McClure River within 5 miles of each other (Tr. 35, 78). This testimony was unrebutted by Martin. As we held in Titan Coal Corp. v. OSM, 78 IBLA 205 (1984):

> OSM's initial burden is limited to a prima facie showing that the one named in the NOV was "engaged in a surface coal mining operation and failed to meet Federal performance standards." Rhonda Coal Co., 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982). Once OSM has made such a showing, the applicant for review then carries the ultimate burden of persuasion. 43 CFR 4.1171(b). The applicant for review must then prove any claimed exemption from coverage under [SMCRA] by presenting supporting evidence as well as carrying the ultimate burden of persuasion if OSM attempts to rebut the evidence. Harry Smith Construction Co., 78 IBLA 27 (1983). Merely asserting an opinion is insufficient to establish an affirmative defense. Sam Blankenship, [5 IBSMA 32, 39, 90 I.D. 174, 178 (1983).] [Emphasis supplied.]

Id. at 213. Specifically, where OSM makes its prima facie showing, the operator bears the burden of proving it is exempt from regulation under the 2-acre rule, as promulgated in 30 CFR 700.11(b). Cumberland Reclamation Co., 102 IBLA 100 (1988); OSM v. C-Ann Coal Co., 94 IBLA 14 (1986). Martin has failed to rebut OSM's showing that the drainage from both operations did not flow into the same watershed. Judge Torbett properly held that the relatedness criterion was met.

Finally, under 30 CFR 700.11(b)(2)(ii)(A), operations shall be deemed under "common control" if, inter alia, they are owned or controlled, directly or indirectly, by or on behalf of the same person. It is uncontested that Martin engaged in mining activities on the Call Fat Branch minesite from December 1980 through January 1981 and on the Trammel Branch minesite in July 1981. OSM's evidence met its burden of making a prima facie showing that Martin controlled both sites.

The record shows, and Martin has not disputed, that he controlled the Trammel Branch minesite (Exh. R-13).

As to the Call Fat Branch minesite, we are persuaded by contemporary inspection reports of DMLR Inspector Orin Harvey, who visited the site in 1981, that Martin did control that site. His report of January 28, 1981, describes the activities underway on the Call Fat Branch minesite:

> New strip & auger operation was investigated on this date by inspector Orin Harvey with engineer Joe Yarborough and operator Doug Martin. The haulroad to this operation was previously permitted to Lambert Coal Co. #2882-U and has since been deeded to Dickenson County. No work was taking place during this inspection, however approximately 300 linear [feet] of highwall has been stripped and augered. The mine site has been flagged and calculated by Mr. Yarborough at approximately 1.9 acres. The operator has conducted operations within the flagging with approximately 1 acre disturbed to date. Mr. Martin indicated that he did not intend to exceed this flagging to assure that this disturbance would remain under 2 acres. Mr. Martin also indicated that the auger holes would be sealed and the bench regraded. No sediment control structures have been constructed to handle surface drainage from this operation, however drainage is directed back toward the pit area & highwall. No serious environmental damage was noted on or by this disturbance at this time.

(Exh. R-14, Tr. 72-75). Harvey testified that his report naming Martin as operator was based on conversations in January 1981 with Martin. Thus, in January 1981, Harvey was convinced that Martin was the operator of a mine at which the land had been disturbed enough that some augering was already completed. Further, it is apparent from the fact that a site had been flagged that Martin had planned to complete the mine himself and that he was about halfway finished with the minesite at that time.

We are convinced that Martin had control over the Call Fat Branch operation in 1981 notwithstanding that E. C. French was removing coal from the site during a portion of that time. Martin admitted that he was responsible for augering coal at the site as late as in September 1981, when he directed one Boggs to auger coal, which was sold in his name (Tr. 23, 101) at the same time French was mining (Tr. 24). Such activity indicates that Martin remained in control of the Call Fat Branch operation until the very end of the mining activity there.

Against this background, we find unconvincing Martin's evidence that he engaged only in limited mining in January 1981, and that the site was actually disturbed principally in August and September 1981 by French, who was acting on his own without guidance from Martin. French, who had been Martin's employee for several years, having served as his foreman on previous mining operations, testified that he (French) secured a permit for the Call Fat Branch operation and that it was his operation that disturbed the land. Yet no copy of such permit was placed in evidence, and the contemporary record of Inspector Harvey's inspection contradicts Martin's claims that French, and not Martin, was responsible for the disturbance at the site. For example, Inspector Harvey's statement that augering was underway in January 1981 is directly at odds with Martin's testimony that, as late as September 1981, he had not done enough work to permit the site to be augered and that it was French's subsequent activities on the site that exposed the coal (Tr. 22-23). In such circumstances, where a long

time has passed between events and memories are uncertain, the contemporary report of Inspector Harvey is particularly convincing.

Judge Torbett, who had the benefit of observing the demeanor of the witnesses so as to be able to judge their credibility, found these facts adequate to demonstrate that Martin was in control of the Call Fat Branch site within the meaning of 30 CFR 700.11(b). We see no basis to disturb his findings.

[3] On appeal, Martin argues that he is being held responsible for reclaiming environmental damage actually caused by French. We have held that, in view of Martin's continued mining of the site in September 1981 when French was active there, he retained control over the site. As a result, he was properly cited for the failure to reclaim. Even assuming arguendo that Martin and French shared control of the operation for a portion of the time the site was being mined, Martin is still liable, as, in such circumstances, both parties are jointly and severally liable for compliance with any applicable performance standards. See S&M Coal Co. v. OSM, 79 IBLA 350, 358, 91 I.D. 159, 163-64 (1984).

Thus, we conclude that Judge Torbett properly concluded that Martin was in control of both sites, that the Call Fat Branch operation was therefore not exempt from regulation under the 2-acre exemption, and that Martin was properly cited for the failure to reclaim violations that exist on the Call Fat Branch minesite.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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David L. Hughes
Administrative Judge

I concur:

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James L. Byrnes
Administrative Judge